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| APPLICATION NO. | FILING DATE | FIRST NAMED INVENTOR | ATTORNEY DOCKET NO. | CONFIRMATION NO. |
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| 10/576,243 | 10/27/2006 | Ralf Dunkel | CS8774/BCS033030 | 8859 |
| 34469 7590 08/27/2009 BAYER CROPSCIENCE LP Patent Department 2 T. W. ALEXANDER DRIVE RESEARCH TRIANGLE PARK, NC 27709 | | | | |
| EXAMINER CHU, YONG LIANG | | | | |
| ART UNIT | | PAPER NUMBER | | |
| 1626 | | | | |
| NOTIFICATION DATE | | DELIVERY MODE | | |
| 08/27/2009 | | ELECTRONIC | | |

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

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Office Action Summary

Application No.

10/576,243

Applicant(s)

DUNKEL ET AL.

Examiner

YONG CHU

Art Unit

1626

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 28 May 2009.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 20, 21, 24, 26-28, 30 and 31 is/are pending in the application.
- 4a) Of the above claim(s) 26, 28 and 31 is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 20, 21, 24, 27 and 30 is/are rejected.
- 7) ☒ Claim(s) 20-21, 24, 27 and 30 is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date _____
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date _____
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: _____

DETAILED ACTION

Claims 20-21, 24, 26-28, and 30-31 are pending in this application. Claims 26, 28 and 31 remain withdrawn as non-elected subject matter.

Applicants' notice of an irrelevant text at the bottom third of page 11 of the previous Office action is correct. That part of text should be ignored.

Response to Arguments

Claim rejection under 35 U.S.C. §112, 1st paragraph

Applicant's amendment of claim 30 by cancelling the rejected intend to use phrase "for controlling unwanted micro-organisms" obviates the rejection.

Claim rejection under 35 U.S.C. §103(a)

Applicant's arguments over rejection of claims 20-21, 24, 27 and 30 have been fully considered, but are found not persuasive. Applicant's arguments are on the ground that a critical feature of such (i.e. the '065 publication) compounds is fluorine substitution at the 5-position of the pyrazole ring, and Applicants' claimed compounds never have a fluorine at the pyrazole 5-position. Applicants further argue that the examples in the *Patani* article clearly demonstrated that the fluorine-substituted compounds showed greater activity in these testing examples than their non-fluorinated counterparts, the specific degree of activity was highly variable and unpredictable from compound to compound and test to test. In addition, Applicants' submitted 132 Declarations showing that the inventive compound of Applicants' Example 6 exhibits unexpectedly superior efficacy at several application rates in three different

antimicrobial tests compared with a corresponding fluorine-substituted compound falling within the general teaching of the '065 publication. Therefore, the testing results in the 132 Declarations constitute unexpected results.

Applicants' arguments are not persuasive because the *Patani* article **does not** teach away the invention from the '065 publication. Even though some examples in the *Patani* article may show -F substituted compounds work better than the un-substituted compounds. However, less active compounds are not equal to the compounds that do not have the claimed utility. **More importantly**, Applicants **incorrectly** interpreted the testing data in Figure 11 of the *Patani* article. At the third paragraph of page 10 of the reply, Applicants stated that "Figure 11 shows about 1.6 times greater angiotensin converting enzyme activity and about 2.4 times greater endopeptidase activity for a fluorine-substituted test compound." As a matter of fact, the testing results in Figure 11 tell an **opposite** conclusion from Applicants' conclusion: about 1.6 times greater angiotensin converting enzyme activity and about 2.4 times greater endopeptidase activity for a **H- substituted test compound** (IC₅₀ is 4.3 and 2.5) **than the fluorine-substituted test compound** (IC₅₀ is 6.9 and 5.9), because the less IC₅₀ value, the greater the biological activity (i.e. more potent for less concentrated compound). Therefore, the Office has established *prima facie* case of obviousness. In terms of the 132 Declarations, they are not sufficient to overcome the 103(a) rejection, because the testing compound in the Declarations is different from the cited compound, and the micro-organisms used for the testing are also different (i.e. *Pyrenophora Teres*,

Podosphaera, and *Alternaria* for the '065 publication, and *Sphaerotheca* and *Uncinula* for the Declarations). Therefore, the 103(a) rejection is maintained.

Obviousness-type double patenting rejection

Applicant's arguments over the ODP rejections are also not persuasive based on the same analysis above. Therefore, the rejections are maintained. However, appropriate Terminal Disclaimers may overcome the ODP rejections.

Claim objection

The claim objection is maintained because the pending claims still contain non-elected subject matter.

Conclusion

- No claims are allowed.

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Telephone Inquiry

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Yong Chu, Ph.D., whose telephone number is 571-272-5759. The examiner can normally be reached on 7:00 am - 3:30 pm EST. If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Joseph M^{re}Kane can be reached on 571-272-0699. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Status information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only.

/Yong Chu/
Patent Examiner
Art Unit 1626